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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE,

Petitioner,

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRY-DOCK CO.

JAMES PURDHAM,

Petitioner,

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRY-DOCK CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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The Petitioners, Joseph B. White and James Purdham, respectfully pray that a Writ of Certiorari issue to review

the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on November 9, 1964.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not been reported as yet but is set forth in App. A at page 1a.

The oral opinion of the United States District Court for the District of Maryland is set forth in App. A at page 5a.

The Compensation Orders of the Deputy Commissioner (Case No. 61-3476 — Joseph B. White; Case No. 61-3485 — James Purdham), in App. A at pages 9a, 11a.

The Memorandum of the Deputy Commissioner in Support of the Compensation Orders, in App. A at page 13a.

JURISDICTION

The judgment of the Court of Appeals was entered in the above entitled action on November 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

I. Although the facts of the Petitioners' respective employment in this case clearly come within the provisions of Subsection (b) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, infra, hereinafter called the Act, the Deputy Commissioner applied Subsection (c) in determining their compensation benefits. The question that arises must be stated in two parts:

a. (In the language of the subsection (b).) Under the Longshoremen's and Harbor Workers' Compensation Act, infra, where "the injured employee [has not] worked in

the employment in which he was working at the time of the injury . . . during substantially the whole of the year immediately preceding his injury" and there is "an employee of the same class (who has worked) substantially the whole of such immediately preceding year in the same . . . employment," may the Deputy Commissioner, in determining the injured employee's compensation benefit, apply Subsection (c) of Section 910 of the Act rather than Subsection (b) without a showing that Subsection (b) could not reasonably and fairly be applied?

b. Where there are other employees of the same class whose work is substantially regular and continuous, does the mere irregularity or intermittence of the injured employee's work make it unreasonable or unfair to apply the formula set forth in Subsection (b) of Section 910 of the Act?

II. Although the Deputy Commissioner indicated that he used Subsection (c) in determining the Petitioners' respective compensation benefits, he did not have "regard to the previous earnings . . . of other employees of the same or most similar class" as that of the Petitioners' respectively.

Under Subsection (c) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, may the Deputy Commissioner merely take the average weekly wage earned by the injured employee during the 52 weeks prior to his injury as the basis upon which to compute his compensation benefits without taking into consideration the earnings of other employees of the same class working for the same employer?

III. The Deputy Commissioner held that an injured employee who enjoys a seniority standing under a typical seniority provision of a labor-management agreement does not belong to any class of employees as that term "class"

is used in the statute. This holding would preclude such an employee from the benefit of having his rate of compensation based on the earnings of a fellow employee of the same class who has worked substantially throughout the statutory period as provided in Subsection (b) or from the benefit of having his earnings considered with those of other employees of the same class as provided by Subsection (c).

a. Does an injured employee's seniority standing under a typical seniority provision of a labor-management agreement deprive him of the benefit of having his compensation computed under Subsection (b) of Section 910 of the Act?

b. Does an injured employee's seniority standing under a typical seniority provision of a labor-management agreement deprive him of the benefit of having the earnings of fellow employees considered in the computation of his compensation as provided by Subsection (c) of Section 910 of the Act?

STATUTE INVOLVED

The statute involved in this case is Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., 901 et seq., hereinafter referred to as the Act. This section of the Act is fully set forth in App. B, infra, page 20a.

STATEMENT OF THE CASE

The Petitioners, Joseph B. White and James Purdham, sustained accidental injuries arising out of and in the course of their employment in 1962, which resulted in substantial periods of total disability and thereafter in permanent partial disability. At the time of their injuries, both Petitioners were receiving wages of $3.00 per hour for a standard forty hour week — a gross weekly wage of $120.00.

Yet, they were awarded compensation in the amount of $22.99 per week and $47.76 per week respectively. These awards were affirmed by the District Court and the Circuit Court of Appeals. These cases were consolidated by the District Court.

As to Joseph B. White

On March 30, 1962, the Petitioner, a chipper and caulker for the Maryland Shipbuilding and Drydock Company, sustained an accidental injury to his left foot, arising out of and in the course of his employment. As a result thereof, the Petitioner was totally disabled from March 31, 1962 to June 3, 1962, inclusive, a period of 9⅔ weeks. The Deputy Commissioner found that as a further result of said injury, the Petitioner has a permanent partial disability equal to 17.5% loss of use of his left foot and was therefore entitled to 35.88 weeks of compensation. The Deputy Commissioner fixed the rate of compensation at $22.99 per week.

During the period from March 30, 1961 to March 29, 1962, the twelve month period immediately preceding the date of the Petitioner's injury, there were 92 employees in the chippers and caulkers seniority unit. The first 23 men in seniority standing earned more than 200 days pay The Petitioner, who was 58th in the seniority standing, earned 74 days pay. All of these employees had the same wage rate of $3.00 per hour.

During the periods of his unemployment due to layoff for lack of work, the Petitioner received unemployment compensation under the Maryland Unemployment Compensation Law at the rate of $37.00 per week.

As to James Purdham

On May 4, 1962, the Petitioner, a shipfitter for the Maryland Shipbuilding and Drydock Company, sustained an accidental injury to his left hand, arising out of and in the

course of his employment. As a result thereof, the Petitioner was wholly disabled from May 5, 1962 to July 1, 1962, inclusive, a period of 8⅔ weeks. The Deputy Commissioner found that as a further result of said injury, the Petitioner has a permanent partial disability equal to 10% loss of use of his left hand and was therefore entitled to 24.4 weeks of compensation. The Deputy Commissioner fixed the rate of compensation at $47.76 per week.

During the period from May 4, 1961 to May 3, 1962, the twelve month period immediately preceding the date of the Petitioner's injury, there were 41 employees in the shipfitter seniority unit. The first 13 men in seniority standing earned more than 200 days pay. The 14th man earned 194 days pay; the 15th, 187 days pay; the 16th, 185 days pay. The Petitioner who was 17th in seniority standing, earned 149 days pay. All of these employees had the same wage rate of $3.00 per hour. The employer's records indicate that the Petitioner would have been employed throughout the period of his temporary total disability.

Common to Both

The Petitioners are members of Local 31 of the Industrial Union of Marine and Shipbuilding Workers of America. Their employment at the employer's shipyard is covered by a labor-management agreement between that union and the employer. This agreement contains a seniority provision which is typical of that contained in most labor-management agreements. Under this provision, the employees at the employer's shipyard are grouped into various and separate seniority units according to the craft in which they work. When a reduction of the work force in a unit is necessitated by a lack of work, an employee having less seniority in point of length of service with the employer will be laid off before other employees having

greater seniority. In like manner, this same employee would not be recalled to work in his seniority unit until men who have greater seniority and who are also on lay-off status, are recalled.

For a great many years, the employer has operated what can be regarded as one of the nation's major shipyards in the Port of Baltimore. Through the years, long beyond any period of time relevant to this case, the employer has been in continuous operation, as have its ironworking department, of which the chippers and caulkers are a part, and its shipfitting department. During the five year period from 1958 through 1962, the employer's sales were as follows: 1958 — $35,554,334; 1959 — $26,379,649; 1960 — $29,357,947; 1961 — $29,683,925; and 1962 — $22,735,089. The average dollar volume of sales for this five year period was $28,741,388.

REASONS FOR GRANTING WRIT

This case presents an issue of extremely great importance to the adjudication of each and every workmen's compensation claim throughout the country arising under the Longshoremen's and Harbor Workers' Compensation Act, supra, and the other compensation acts modeled after it, to wit: District of Columbia Compensation Act (36 D.C. Code 501, et seq.) and Defense Bases Act (42 U.S. Code 1651, et seq.). The questions presented in this case involve the method of computing the injured employee's average weekly wage for the purpose of determining the amount of his weekly compensation benefit.

As a result of the decision now before the Court and other decisions mentioned herein, the present status of the law works a great hardship upon a large number of Claimants situated similarly to the Petitioners. The Petitioner White's case illustrates this hardship very well. Although his em-

ployment did fluctuate, the record shows that he would have worked throughout the 9⅞ weeks of his total disability. During this period he would have earned $120.00 per week; yet, the Deputy Commissioner fixed the rate of his compensation at $22.99 per week.* This substandard rate of compensation was computed by the Deputy Commissioner by dividing the Petitioner's actual earnings during the year preceding his injury, by 52.

Prior to 1961, when Congress increased the maximum compensation benefits under the Act from $54.00 per week to $70.00 per week, the employer did not raise the issue of average weekly wage and the claimants situated similarly to the Petitioners were invariably allowed the maximum compensation benefits. However, if the decision in the case now before the Court is permitted to stand, we can expect the application of the abovementioned method of computation of benefits in every similar case throughout the country. This case, therefore, is of importance far beyond the particular facts and parties involved herein. It would seem that only a decision by this Court correcting the misinterpretation of Section 910 of the Act can prevent economic distress to many claimants under the Longshoremen's and Harbor Workers' Compensation Act and similar acts.

I.

The Petitioners' Average Weekly Wage Should Be Computed under Subsection (b) of Section 910 of the Act.

It is the position of the Petitioners that Subsection (b) is the appropriate section upon which to compute their

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* It is interesting to note that if White had been off from work because of a layoff rather than because of his injury, he would have received $37.00 per week unemployment compensation under the Maryland Unemployment Compensation Law.

compensation. These cases fall within the clear meaning of this subsection: the Petitioners did not work during substantially the whole of the year immediately preceding their injuries and there were employees of the same class(es) working substantially the whole of such immediately preceding year in the same employment. However, the Deputy Commissioner held that Subsection (b) "was designed to protect new employees entering an employment that is substantially continuous" and refused to apply it in computing the Petitioners' compensation. Instead, the Deputy Commissioner used Subsection (c) in making his computations. (That he did so incorrectly is discussed later.) The decision was affirmed by the District Court and the Circuit Court of Appeals.

Certainly the narrow interpretation of Subsection (b) made by the Deputy Commissioner cannot be correct. The language is clear. Subsection (b) is to be used if the injured employee did not work substantially the whole year immediately preceding his injury and there is an employee of the same class who did work substantially the whole of that year.

Subsection (c) is to be used only if Subsections (a) and (b) "cannot reasonably and fairly be applied." *O'Hearne v. Maryland Casualty Company*, 177 F. 2d 979 (4th Cir., 1949).

Yet, the Circuit Court of Appeals held that Subsection (b) could not be applied "because the [Petitioners'] employment during the appropriate statutory period was intermittent and irregular in nature. . . ." There is no requirement in the statute that Subsection (b) may be applied only where the employment is regular and continuous. This concept was introduced in 1931 by a District Court in the case of *Mahony Company v. Marshall*, 46 F. 2d 539

(W.D. Wash.). This case was affirmed by the Circuit Court of Appeals for the Ninth Circuit and reported in 56 F. 2d 74, and has been followed in the Fourth Circuit, *Baltimore & O. R. Co. v. Clark*, 56 F. 2d 595 (4th Cir., 1932), and the United States Court of Appeals for the District of Columbia, *Johnson v. Britton*, 290 F. 2d 355, cert. denied, 368 U.S. 859 (1961), and now again in the Fourth Circuit in the instant case.

The rationale of these cases is that the irregularity and intermittence of employment necessarily make it unfair and unreasonable to apply Subsection (b). That this rationale will not stand the test of logic can be illustrated readily by the facts in Petitioner Purdham's case.

According to the employer's record, had Purdham not been injured on May 4, 1962, he would have continued to work through August 1, 1962, which is as far as the record went. (There is no evidence of Purdham's refusing work when it was available.) During this time, he would have made $120 per week. His period of temporary total disability extended from May 5, to July 1, 1962 when he returned to work. It is certainly not unreasonable or unfair to pay him compensation for this period of time based on a wage earning capacity of an amount that would approximate $120.00 per week, as would be the case is Subsection (b) were used. In fact, it would seem grossly unreasonable and unfair to base his compensation on a lower figure. This is true in Petitioner White's case also.

Of course, the amount of weekly compensation set for this period of temporary total disability would be the same amount used for the payment of permanent partial disability. However, even here it would not be unreasonable or unfair to use Subsection (b) to determine Petitioners' rate of compensation.

Purdham is 17th in seniority standing in his classification. The first 13 men worked substantially the whole of the twelve month period immediately prior to his injury. This means that there were only 3 men between him and his being substantially continuously employed — *even in a year when the employer's sales were more than 20% less than its average for the five years prior thereto.* Indeed, it would seem unreasonable and unfair to limit Purdham to a rate of compensation for permanent disability because the employer's sales had dropped during the twelve month period upon which his compensation is to be calculated. Even if the employer's business did not improve in time to come, it is predictable that, by reason of the retirement of older employees, in a few years Purdham himself would be among the group of men who do work substantially the entire year. This expectancy is one of the effects of the seniority provisions discussed earlier.

Thus, it would appear to be unreasonable and unfair *not* to apply the formula in Subsection (b) in the computation of the Petitioners' rate of compensation.

The judicially created requirement of regular and continuous employment for the application of Subsection (b) frustrates the remedial purpose of the Act and derogates the fundamental rule of law that such a statute must be liberally construed.

II.

Even if the Use of Subsection (c) Were Proper, It Was Not Properly Applied.

The Deputy Commissioner considered only the actual earnings of the Petitioners during the twelve month period immediately prior to the date of their injuries. He divided this gross amount by 52 to arrive at the Petitioners' average

weekly wage. This is clearly erroneous. Even under Subsection (c) the Deputy Commissioner was required to take into consideration the earnings of other employees within the Petitioners' seniority units:

The Court of Appeals in its opinion stated that the Deputy Commissioner did consider the earnings of employees performing the same work as the Petitioners. A reading of the Deputy Commissioner's memorandum (App. A, p. 13a) will not support this statement. There is no reference whatever to the earnings of other chippers and caulkers in the Petitioner White's case. The Deputy Commissioner does mention the earnings of the employee immediately above the Petitioner Purdham in seniority standing and the earnings of the employee immediately below; but, consistent with his interpretation of the effect of the seniority provision of the labor-management agreement under which the Petitioners worked, the Deputy Commissioner expressly refused to consider the earnings of these other employees. Referring to the employee immediately above the Petitioner Purdham, he said (App. A, p. 18a): "The claimant did not have the capacity in this employment to earn the wage of Kleppert because of the seniority rule."

Even if he had considered the earnings mentioned, it would hardly seem appropriate to have made such a sparse sampling of the earning experiences within the Petitioners' respective classes.

III.

The Term "Class" as used in Section 910 of the Act for the Purposes of the Joseph B. White Case means "Chippers and Caulkers First Class", and for the Purposes of the James Purdham Case means "Shipfitters First Class," as those Terms are used in the Labor-Management Agreement between the Maryland Shipbuilding & Drydock Company and the Petitioners' Union.

There is yet another erroneous interpretation of the statute in this case. This involves the meaning of the term "class" as it is used in Subsection (b) in the phrase "employee of the same class" and in Subsection (c) in the phrase "employees of the same or most similar class."

It would seem that defining the class of employees to which each Petitioner in the instant cases belongs would present no problem. Since 1939, the employees of the Maryland Shipbuilding and Drydock Company have been classified by the labor-management agreement under which they work. This classification has been honored by the experience of over twenty-five years. It forms the basis in many respects for the employer's mode of operation and for the rights of the employees.

Under this classification, the employees of the Maryland Shipbuilding and Drydock Company are placed in groups according to their craft and according to their skill and ability in that craft. Except under certain circumstances, they are not permitted to do work outside of their craft. All of the employees working within each classification are to be treated equally with respect to the hourly rate paid them and the amount of overtime given them.

The class to which Petitioner White belongs is that of "chipper and caulker first class"; the class to which the

Petitioner Purdham belongs is that of "shipfitter first class." This classification is reasonable and workable and is the basis upon which the employer-employee relationship exists between the Petitioners and the employer, Maryland Shipbuilding and Drydock Company.

Yet, the Deputy Commissioner disregarded this classification. In his memorandum (App. A, p. 15a), he says: "If, 'employee of the same class' is to be distinguished from 'employee of the same classification', then there is no other employee in the same class as either of these two employees on a seniority basis as established by the union agreement." Thus, he negates the existence of any class of employees to which the Petitioners or anyone working under a typical seniority provision of a labor-management agreement belong.

This interpretation was affirmed by Judge Winter of the District Court, who, in his oral opinion, said:

> "I think, as the Deputy Commissioner rather convincingly spells out in his memorandum, that when you introduce into the carrying on of any occupation all of the restrictions and preferences of a strict seniority system, that in looking for comparables, about the only true comparable that exists with respect to an employee working in such a stratified occupation is the experience with reference to that employee himself."

Judge Winter then went on to say that he did not think it necessary for the Deputy Commissioner to have considered any evidence of earnings other than that of the Petitioners themselves (App. A, page 7a).

The impact of this concept upon cases arising under the Act cannot be exaggerated. It would deprive any employee working under a labor-management agreement containing the typical seniority provisions of the benefit of

the formula set forth in Subsection (b) of Section 910 and of a favorable computation of compensation benefits under Subsection (c). When one considers that probably more than 80% of the shipyard workers throughout the country work under such a seniority provision, one can appreciate the magnitude of this holding.

This Court has never construed Section 910 of the Longshoremen's and Harbor Workers' Compensation Act as it relates to the problem in this case. It is respectfully submitted that this matter should be settled by this Court since it affects the rights of numerous claimants throughout the country who are not in a position to engage in protracted and expensive appeals from erroneous administrative determinations by the Deputy Commissioners and their staff of claims examiners and who therefore must of necessity accept compensation benefits in amounts less than which they are properly and legally entitled.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX A

OPINIONS BELOW

United States Court of Appeals for the Fourth Circuit

No. 9520

Joseph B. White and James Purdham,
Appellants,

versus

Stephen O'Hearne, Deputy Commissioner, Bureau of Employees' Compensation, Fourth Compensation District, and Maryland Shipbuilding & Drydock Company,
Appellees.

Appeals from the United States District Court for the District of Maryland, at Baltimore
Harrison L. Winter, District Judge.

(Argued September 22, 1964. Decided November 9, 1964.)

Before Sobeloff, Chief Judge, and Haynsworth and J. Spencer Bell, Circuit Judges.

Bernard G. Link for Appellants, and George M. Lilly, Attorney, United States Department of Labor, (Charles Donahue, Solicitor, and Alfred H. Myers, Attorney, United States Department of Labor, and Thomas J. Kenny, United States Attorney, and Joseph H. H. Kaplan, Assistant United States Attorney, on brief) for Appellee Stephen O'Hearne, and Thomas E. Cinnamond (Semmes, Bowen & Semmes on brief) for Appellee Maryland Shipbuilding and Drydock Company.

PER CURIAM:

The appellants, two employees of the Maryland Shipbuilding and Drydock Company injured in the course of their employment, seek review of a judgment of the district court affirming compensation orders and awards under the Longshoremen's and Harbor Workers' Compensation Act by the Deputy Commissioner of the Department of Labor's Bureau of Employees' Compensation, Fourth Compensation District.

This appeal raises two issues. It is contended first that the Deputy Commissioner should have used subsection (b) of section 910 of the Act[1], rather than subsection (c), in

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[1] The relevant parts of 33 U.S.C.A. § 910 are:

"§ 910. Determination of pay

"Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

"(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

"(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

"(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-em-

computing the earnings of these employees for purposes of the compensation award, and second, that even if subsection (c) was the correct section, it was misapplied. Both issues must be decided against the appellants.

On the first issue, we agree with the district court that the evidence in the record amply supports the Deputy Commissioner's findings of fact and conclusions of law that because their employment during the appropriate statutory period was intermittent and irregular in nature, these employees are not within the categories covered by subsections (a) and (b) of the Act. This point was long ago clearly settled in this Circuit by the opinion in *Baltimore & O. R.R. Co. v. Clark*, 59 F. 2d 595 (4 Cir. 1932), and reaffirmed in *O'Hearne v. Maryland Casualty Co.*, 177 F. 2d 979 (4 Cir. 1949). In the former case the principle is discussed at length, and we see no need to repeat what was said there, since its application to the facts in this case is obvious.

As to the second point, appellants assert that the Deputy Commissioner considered only their actual earnings during the twelve month period preceding the injury even though the statute required that he consider the earnings of other employees in appellants' seniority units. The record before us clearly shows, however, that the Deputy Commissioner considered and compared the earning records of employees performing the same work who had both higher and lower seniority status than the litigants. After making the comparison, he reached the expert conclusion that the use of the litigants' actual earnings for the previous twelve month period was fair and equitable to all concerned, because the seniority system controlled the availability of work for the individual employee, resulting in substantial differentials in earnings. The weight which the Deputy Commissioner gave to these facts is a matter within his expert competence; and since his conclusions are in accordance with law, we must accept them. 33 U.S.C.A. §921; *Walsh Stevedoring*

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ployment, shall reasonably represent the annual earning capacity of the injured employee.

"(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

Co. v. Henderson, 203 F. 2d 501 (5 Cir. 1953); *Colonna's Shipyard, Inc. v. O'Hearne*, 200 F. 2d 220 (4 Cir. 1952).

The appellants' reliance upon *Fireman's Fund Ins. Co. v. Peterson*, 120 F. 2d 547 (9 Cir. 1941), is not well taken. The opinion in that case clearly states that the award was set aside because there was no evidence that the previous earnings of other employees had been considered. Here the Deputy Commissioner's memorandum in support of the compensation orders expressly recites that he considered the earnings of other employees; however, he concluded that this information did not justify changing his decision to use the appellants' actual earning experience as the basis for the compensation awards.

Affirmed.

JUDGMENT

(Filed November 9, 1964)

United States Court of Appeals
For the Fourth Circuit

No. 9520

Joseph B. White and James Purdham,
Appellants.

vs.

Stephen O'Hearne, Deputy Commissioner, Bureau of Employees' Compensation, Fourth Compensation District, and Maryland Shipbuilding & Drydock Company,
Appellees.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed; and that the costs on appeals of Maryland Shipbuilding & Drydock Company be borne by the appellants.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

November 9, 1964.

A true copy,

TESTE:

MAURICE S. DEAN,
Clerk.

ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

WINTER, J.

The problem in this case is essentially whether the Deputy Commissioner has correctly interpreted and applied Section 910 of the Act in determining what award should be made to the two claimants, Mr. White and Mr. Purdham, respectively.

The Deputy Commissioner, after hearing all of the evidence, concluded that Subsection (c) of that section was the portion of the law under which an award was to be made.

It is claimed that the Deputy Commissioner was in error, that, rather, he should have determined the amount of the award under Subsection (b). Section 910 in its entirety is the congressional effort to measure the lost earning power occasioned by death or accidental injury under the Act and to project its value in the event that benefits under the Act become payable by reason of accident or death.

The congressional policy is fairly well fixed that the projection is to be made on earning power of the last

twelve months, depending upon in which of the three categories spelled out in Section 910 a particular employee may fit.

As I read the Deputy Commissioner's findings in this case, as supplemented by his memorandum, in essence, what he has said is that he has found, first, that Section 910(a) is inapplicable because neither employee worked for this particular employer or a similar employer during substantially the whole of the year immediately preceding his injury. No contest in this appeal is made as to the correctness of this finding.

The Deputy Commissioner has found secondly that Section 910(b) does not apply either because he has found that the injured employee shall not have worked in the employment during substantially the whole of such year. He concludes that Section 910(b) does not apply because, as I read what he has written, he has found, at least for the Baltimore area and not limited to this employer, but, rather, including all similar employers in the Baltimore area, that with respect to these two employees, having their skills, their grade of efficiency and their seniority rights, that for the year immediately preceding the date of injury, the work afforded them was discontinuous and intermittent, and by reason of the fact of being discontinuous and intermittent, that it would not be fair, to paraphrase the language of Subsection (c), to use the test of Subsection (b) of Section 910 because the result would be to create a projection of future economic earning capacity way above any sense of reality or actuality, insofar as it was based upon the foreseeable future as he could see it but, more particularly, based upon a projection of what had taken place in the year immediately preceding the accident.

There is no question in my mind whatsoever that, based upon the Baltimore and Ohio Railroad Company vs. Clark decision in 59 Fed. 2d at 595, as repeated, you might say, with approval — I think the essential holding was repeated with approval, although you had a different fact situation and a different result — in O'Hearne vs. Maryland Casualty

Company, 177 Fed. 2d 979, but to go back, under these authorities, there seems to my mind to be little question but that if you find that employment is discontinuous and intermittent, that an award under Subsection (b) would be improper as a matter of law.

As I have said, the Deputy Commissioner has found that the work was discontinuous and intermittent, and on reviewing the evidence, I certainly cannot say that on the record as a whole, that that finding is not adequately and properly and fairly supported by substantial evidence.

That being so, in the exercise of any right of review, even if I were to disagree with his conclusion, I would have no legal authority to disturb it.

It seems to me, therefore, as to the first proposition decided by the Deputy Commissioner and the first line of attack made on the conclusions of the Deputy Commissioner, that, first, the Deputy Commissioner was correct and, secondly, that there is no merit in the attack.

A second ground of attack on the award is the actual computation of the actual benefits to White and to Purdham. I think, as the Deputy Commissioner rather convincingly spells out in his memorandum, that when you introduce into the carrying on of any occupation all of the restrictions and preferences of a strict seniority system, that in looking for comparables, about the only true comparable that exists with respect to an employee working in such a stratified occupation is the experience with reference to that employee himself.

Notwithstanding that I am inclined to think that the Deputy Commissioner could have limited his considerations to simply what these particular employees made themselves and not consider any other evidence, there is no question about the fact that other evidence of other comparables was offered and received by the Deputy Commissioner and considered by him.

I think, of course, the two best comparables are the man having (a) the next higher seniority rating and (b) the

man having the next lower seniority rating. If those comparables are taken into consideration in the sense that they are strictly averaged, then it would turn out that the award to White and the award to Purdham would be less than the awards which the Deputy Commissioner actually made, so that I think it can be shown mathematically that in the interest of fairness, the Deputy Commissioner actually came out with the averages of the particular employees, but I think the significant thing is that the other evidence was received to show that those averages, as a projection of past economic ability to earn money, are not out of line, in other words, that what is done by projecting the actual earnings of Mr. White and Mr. Purdham and using them as the basis for the award is not to create any great inequity or great disparity compared to what would be done if you took the averages of other comparable people.

It seems to me, therefore, that under the circumstances, the method in which the actual computation was made by the Deputy Commissioner was within the law and was certainly within the realm of his expertise and the element of administrative discretion vested in him, so that I am unable to say that the award was not properly made as a matter of law, or that he did not consider the proper evidence, or that the result at which he arrived is not supported by substantial evidence.

Coming to the conclusion, therefore, gentlemen, that there are no legal infirmities in either of the two grounds upon which the awards of the Deputy Commissioner are made in each of these two cases, I will dismiss the suits for injunction, believing as I do that the awards of the Deputy Commissioner in each of the two cases are correct and should be affirmed.

I will ask you, Mr. Cinnamond, if you and Mr. Lilly can prepare a short form of order for me.

United States Department of Labor — Bureau of Employees' Compensation

Fourth Compensation District

COMPENSATION ORDER AWARD OF COMPENSATION

(Case No. 61-3476 — Joseph B. White)

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 30th day of March 1962, the claimant above named was in the employ of the employer above named at Baltimore in the State of Maryland, in the Fourth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was self-insured; that on said day, claimant herein while performing service as an ironworker, chipper and caulker for the employer and engaged in repairing the S/S "CHERRY VALLEY", which was afloat in the Patapsco River, sustained accidental injury resulting in his disability when while chipping a section of catwalk railing, the section fell on his left foot, causing fracture of the base of the second metatarsal; that written notice of injury was not given within thirty days but the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the claimant's average earnings for the year immediately preceding the date of his injury are $1,793.14; that the average weekly wage is $34.48; that as the result of the injury sustained, the claimant was wholly disabled from 31 March 1962 to 3 June 1962, inclusive, and he is entitled to 9$\frac{3}{7}$ weeks compensation at the rate of $22.99 per week for such temporary total disability; that as a further result of the injury sustained, the claimant has

permanent partial disability equal to 17½% loss of use of his left foot and he is entitled to 35.88 weeks compensation at the rate of $22.99 per week for such partial disability; that the compensation for temporary total disability amounts to $213.48; that the compensation for permanent partial disability amounts to $824.88; that the compensation for temporary total disability and permanent partial disability amounts to $1,038.36; that the employer and self-insurer have paid $422.13 to the claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer and self-insurer, Maryland Shipbuilding & Drydock Company, shall pay to the claimant compensation as follows: for temporary total disability from 31 March 1962 to 3 June 1962, inclusive, 9⅔ weeks at $22.99 per week, $213.48, and for permanent partial disability, 35.88 weeks at $22.99 per week, $824.88, a total for all disability of $1,038.36. The employer and self-insurer having already paid $422.13 to the claimant as compensation, and sufficient time having elapsed since the date of last payment of compensation, shall pay forthwith the balance of $616.23 at which time the case shall be CLOSED.

Fees in the amount of $25.00 to Dr. Matyas Relle and in the amount of $150.00 to Bernard G. Link, claimant's attorney, are approved and shall be satisfied by deduction from compensation payable to the claimant.

Given under my hand at Baltimore, Maryland, this 20th day of June 1963.

STEPHEN O'HEARNE,
Deputy Commissioner
Fourth Compensation District.

United States Department of Labor — Bureau of Employees' Compensation

Fourth Compensation District
COMPENSATION ORDER AWARD OF COMPENSATION

(Case No. 61-3485 — James Purdham)

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 4th day of May 1962, the claimant above named was in the employ of the employer above named at Baltimore in the State of Maryland, in the Fourth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was self-insured; that on said day, claimant herein while performing service as a shipfitter for the employer and engaged in repairing the S/S "TAMPICO" which was afloat in the Patapsco River, sustained accidental injury resulting in his disability when while laying out a cut on a pipe, the pipe fell on his left hand, causing compound fracture of the shaft of the 5th metacarpal; that written notice of injury was not given within thirty days but the employer had knowledge of the injury and has not been prejudiced by lack of such written notice; that the employer furnished claimant with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the claimant's average annual earnings for the year immediately preceding his injury are $3,725.27; that the average weekly wage of the claimant at the time of his injury was $71.64; that as the result of the injury sustained, the claimant was wholly disabled from 5 May 1962 to 1 July 1962, inclusive, and he is entitled to $8\frac{2}{7}$ weeks compensation at $47.76 for such total disability; that as a further result of the injury sustained, the claimant has permanent partial

disability equal to 10% loss of use of his left hand and he is entitled to 24.4 weeks compensation at the rate of $47.76 for such partial disability; that the compensation for temporary total disability amounts to $395.72; that the compensation for permanent partial disability amounts to $1,165.34; that the compensation for temporary total disability and permanent partial disability amounts to $1,561.06; that the employer and self-insurer have paid $395.72 to the claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer and self-insurer, Maryland Shipbuilding & Drydock Company, shall pay to the claimant compensation as follows: for temporary total disability from 5 May 1962 to 1 July 1962, inclusive, 8⅔ weeks at $47.76 per week, $395.72, and for permanent partial disability 24.4 weeks at $47.76 per week, $1,165.34, a total for all disability of $1,561.06. The employer and self-insurer having already paid $395.72 to the claimant as compensation and sufficient time having elapsed since the date of last payment of compensation, shall pay forthwith the balance of $1,165.34 at which time the case shall be CLOSED.

Fees in the amount of $25.00 to Dr. Matyas Relle and in the amount of $200.00 to Bernard G. Link, claimant's attorney, are approved and shall be satisfied by deduction from compensation payable to the claimant.

Given under my hand at Baltimore, Maryland, this 20th day of June 1963.

STEPHEN O'HEARNE,
Deputy Commissioner,
Fourth Compensation District.

MEMORANDUM

(In support of Compensation Orders)

Case No. 61-3485

James Purdham

v.

Maryland Shipbuilding & Drydock Company

D/A 4 May 1962

Case No. 61-3476

Joseph B. White

v.

Maryland Shipbuilding & Drydock Company

D/A 20 May 1962

There are two issues in each of these cases. The issue of disability has been submitted on medical reports. The primary issue is the average weekly wage of the claimants at the time of injury. Each claimant has set forth $120.00 in his claim as the average weekly wage. This is arrived at by multiplying the hourly rate of $3.00 by 40 hours, although in White's case, he received an hourly differential of 7% or .21 per hour on account of night work. It is conceded that neither employee worked substantially 260 days for a five day worker in the year immediately preceding their injury, although Purdham has been carried on the rolls of the employer since 10 May 1955 and White since 10 September 1954. The claimants through their attorney hold that their average weekly wage should be determined under

Section 10(b) of the Act. The employer contends that the average weekly wage should be determined under Section 10(c).

Section 2(13) of the Act defines "Wages" as, "Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury . . .". The money rate in force at the time of injury is set forth in the preceding paragraph. There are no decisions involving this definition. Section 10 concerns Determination of Pay. Although neither side claims that Subsection (a) of this section applies, it is necessary to dispose of this subsection before passing on to the next. Subsection (a) reads, "If the employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed". Each of the claimants was in the employ of the employer for much more than the one year preceding the date of injury in that they were kept on the rolls subject to recall when work became available. The manner in which they should be laid off and recalled is set forth in the agreement between the employer and the claimants' union in paragraph "V" starting on Page 4. Purdham actually worked 136 days preceding his injury but was paid for 149. The difference consists of 3 paid holidays and 10 days vacation. The actual days worked amounts to 52% of 260, the multiplier for a five-day worker. The 149 days for which he was paid amounts to 57%. White worked a total of 64 days. It is clear that neither employee worked in the employment for substantially the whole year immediately preceding the date of their injury.

Subsection (b) of Section 10 reads, "If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual

earnings, if a six-day worker, shall consist of three hundred times the the average daily wage or salary and if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed." The question is, can this subsection be fairly and reasonably applied. Neither of these employees worked elsewhere in the year immediately preceding their injury. However, the wages earned do not represent their entire income for this period. Both of them received unemployment compensation during the periods of [illegible]off. Unemployment compensation is neither "earnings" nor a measure of wage earning capacity. It is not a prerequisite of the employment and cannot be used in determining the average annual wage. If "employee of the same class" is to be distinguished from "employee of the same classification", then there is no other employee in the same class as either of these two employees on a seniority basis as established by the Union agreement. Those employees in the same classification as the claimants herein who enjoyed substantial employment for the year in question are those with much longer seniority or they are union officials. The union officials have top priority under the Union agreement with the employer.

On the whole, it appears that Subsection (b) was designed to protect new employees entering an employment that is substantially continuous. The employer contends that ship repair work is intermittent and discontinuous. In support of this contention they produced witnesses and charts from their own employment and from the largest firm in the field in this Port. If the charts and graphs were made on a daily basis of change, the changes would be much more erratic.

In Marshall v. Andrew F. Mahony Co., C.C.A. Wash. 1932, 56 F. 2d 74, the Court said, "Provision respecting annual earnings of employee, not working substantially whole year before injury, is inapplicable to longshore-

man working only 182 days during such year." Again in California Ship Service Co. v. Pillsbury the same court in 1949, 175 F. 2d 873, said, "Use of provision in subd. (b) of this section fixing injured employee's annual earnings at 300 times his or similar employee's daily wages is proper only in situations where employment is regular and substantially continuous". Fitness, readiness and willingness to work, considered in connection with opportunity to work are shown to be prerequisites in Hartford Accident & Indemnity Co. v. Hoage, 85 F. 2d 411, 416; 66 App. D.C. 154. The two cases more in line with the present cases are O'Hearne v. Maryland Cas. Co., C.A. Va. 1949, 177 F. 2d 979 and Johnson v. Britton 1961, 290 F. 2d 355, 110 U.S. App. D.C. 164, certiorari denied 82 S. Ct. 99, 368 U.S. 859, 7 L. Ed. 2d 56.

In O'Hearne the claimant had been in the employ of the employer two days at the time of injury. For the first half of the year immediately preceding his injury the claimant was serving out a term on a prison farm; the last half he was self-employed as a house painter. In the opinion of the court "Where employer and insurance carrier expressly informed deputy commissioner that they made no contention that employment of shipfitter was intermittent or discontinuous in nature but took the position that this section should be applied whenever the employment of claimant was intermittent and discontinuous, and the court in an action to enjoin enforcement of compensation order, adopted such position which the court of appeals held was erroneous the cause would not be remanded to the deputy commissioner to take further testimony as to whether the occupation of shipfitter in which the employee was engaged was intermittent and discontinuous in its nature". Here the employer did raise the issue at the first hearing on the claims and did submit evidence in support of their position.

In Johnson v. Britton, the claimant was a construction laborer. It was shown that he had worked for the employer 180 days and had earned $3399.76 on the days so worked in the year immediately preceding his injury. The

deputy commissioner held that such work record represents substantial employment and that the days not worked by the claimant were days on which no work was available or days when work could not be performed due to inclement weather and such employment was continuous employment. However, the deputy commissioner found the average weekly wage to be one-fifty second part of the average annual earnings actually earned. The court held that the wage computation was correct according to Section 10(c) of the Act and that Section 10(a) did not apply. It appears that 10(b) is to be used in a case such as O'Hearne v. Maryland Cas. Co. supra, where the employee was not working a full year in the job he was engaged in at the time of injury although the particular job affords year-round employment. Much more could be written and quoted on this subject without adding light. I am satisfied that Subsection (b) does not apply.

Subsection (c) reads, "If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee". This is the only place in the section that "earning capacity" is mentioned. As neither employee worked elsewhere in the year immediately preceding their injury either in the same or any other employment, there is nothing to consider unless "having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury . . ." permits using his earnings for a period longer than the one year immediately preceding the date of injury. It seems to me that the term has a more limited use and confines computation of the average weekly wage to

one year immediately preceding the date of injury. The employees working in the same or most similar class with respect to seniority are Kleppert, Badge No. 969, who worked 124 days and earned $3,873.41, and Brady, Badge No. 9813, who worked 126 days and was paid $3,476.76 (T-104). The subsection does not say we should use the wages earned by the most similarly employed employee, but to have regard to such earnings as a guide to what the claimant may have earned in the same employment. The claimant did not have the capacity in this employment to earn the wage of Kleppert because of the seniority rule. This rule is not the employers' but the claimants' bargaining agent.

It seems fairly established from the record that the employer did not hold out to either of these employees that they would have substantially full time work. Further, it seems fairly established from the record that these employees knew from their employment in the industry over a period of years that the employment did not offer substantially continuous work employment.

As both White and Purdham have been content to limit their efforts and income to the amount of work offered by the employer, plus unemployment compensation, their actual earnings in the employment fairly represent their annual wages and that 1/52nd part of such wages represents their average weekly wage. In Purdham's case the average weekly wage is $71.64, in White's case $34.48.

We come then to Purdham's entitlement to compensation. There is no issue as to the period of temporary total disability. He shall be awarded compensation for such disability from 5 May 1962 to 1 July 1962, 8 2/7 weeks at $47.76, $ 395.72

and for permanent partial disability equal to 10% loss of use of his left hand, 24.4 weeks at $47.76 per week, 1,165.34

a total for all disability of $1,561.06

of which the employer has already paid to the claimant as compensation 395.72

Sufficient time having elapsed since the date of last payment of compensation, the balance of $1,165.34

shall be paid, less approved fees, in one sum at which time the case shall be CLOSED. The approved fees are: Dr. Matyas Relle, $25.00; Attorney Bernard G. Link, $200.00.

It is agreed that White was temporarily totally disabled from 31 March 1962 to 3 June 1962, and he shall be awarded 9⅔ weeks compensation at the rate of $22.99 per week $ 213.48

and for permanent partial disability equal to 17½% loss of the use of the left foot, 35.88 weeks compensation at $22.99 per week. 824.88

a total for all disability of $1,038.36

of which the employer has already paid to the claimant as compensation 422.13

Sufficient time having elapsed since the date of last payment of compensation, the balance of, $ 616.23

less approved fees, shall be paid forthwith at which time the case shall be CLOSED. The approved fees are: Dr. Matyas Relle, $25.00; Attorney Bernard G. Link, $150.00.

APPENDIX B

Statute Involved

The statute involved in Section 910 of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C.A. Section 901, et seq., hereinafter referred to as the Act, which reads as follows:

"Section 910. Determination of pay

Except as otherwise provided in this chapter, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hundred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar em-employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the aforegoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the pre-

vious earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE, *Petitioner,*

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO., *Respondents.*

JAMES PURDHAM, *Petitioner,*

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT, MARYLAND SHIPBUILDING AND DRYDOCK CO., IN OPPOSITION

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JOSEPH B. WHITE, *Petitioner*,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT, MARYLAND SHIPBUILDING AND DRYDOCK CO., IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App. A, pp. 1a-4a) is reported at 338 F. (2d) 464.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED*

Where the District Court and the Court of Appeals both determined that the evidence in the record amply supports the Deputy Commissioner's findings of fact and conclusions of law (App. A, pp. 3a-4a, 7a-8a) in determining that the average weekly wage of the petitioners should be computed under Subsection (c) of Section 910 of the Longshoremen's and Harbor Workers' Compensation Act, is there any basis for a further review of the decision by this Court?

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Section 901 et seq., hereinafter referred to as the Act, are set forth in the Petition (App. B, pp. 20a-21a).

STATEMENT OF THE CASE

The Deputy Commissioner, after a full hearing, decided that Subsection (c) of Section 910 of the Act should be used in determining the average annual earnings of the petitioners. The basis for his decisions was that employment in the ship repair industry in the Baltimore area is irregular, intermittent and discontinuous and also that it would be unfair and unreasonable, under the particular

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* The Questions presented in the Petition (pp. 2-4) simply indicate the petitioners' disagreement with the Deputy Commissioner's findings of fact, which were sustained by both lower courts, and is an obvious effort to persuade this Court to weigh the evidence independently, which it should not do.

facts involved, to use either Subsection (a) or (b) of the Act in calculating the average wage (App. A, pp. 13a-19a).

The District Court affirmed the awards of the Deputy Commissioner and specifically decided: (1) That, on the record as a whole, the finding that the work was discontinuous and intermittent was adequately, properly and fairly supported by substantial evidence (App. A, p. 7a), and (2) That the actual computation of the petitioners' wages was properly made and that it also was supported by substantial evidence (App. A, p. 8a). The Court of Appeals affirmed the District Court on both grounds.

The following statement of facts will be limited to correction and amplification of the petitioners' statement:

As to Joseph B. White

His seniority date as a chipper and caulker is September 10, 1954 (E's App. 23*). He had been employed by the Company prior to that time, but in 1954 obtained employment elsewhere due to the repeated layoffs and the fact that he wanted a steadier type of employment (E's App. 22, 23, 24). White admitted that the employment situation in 1961, the year preceding the accident in question, was similar to 1954 (E's App. 24). During the 12 month period prior to the accident, as well as during the calendar year 1961, he had not worked elsewhere (E's App. 23). His work was subject to repeated layoffs, which occurred periodically and had been going on for some time (E's App. 24). During the year preceding his injury he had been laid off a total of 11 times (E's App. 24, 25). White's employment was regulated by his seniority date, a fact

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* "E's App." refers to Appellee's appendix in the U.S.C.A. "T's App." refers to Appellants' appendix in the U.S.C.A.

with which he was thoroughly familiar, and he was aware that he was way down on the seniority list (E's App. 24, 25), being 58th out of a total of 92 chippers and caulkers in the department (E's App. 26; T's App. 32-34). In the calendar year 1961 he earned only $1,315.49 (E's App. 23), and was paid for a total of 52 days, including paid holidays and vacation days (E's App. 24). Evidence was introduced showing all the chippers and caulkers who were on seniority for the 12 months prior to the accident (T's App. 32-34), including their seniority dates, actual days worked, vacation and holidays, total days paid and gross wages. This showed that the petitioner actually worked 63 days, was paid for a total of 74 days, and earned $1,793.14. The man immediately above White on the seniority list was Charles Hunt, who earned $1,633.04 and was paid for a total of 65 days. The man immediately below on the seniority list was William McComas, who was paid for a total of 55 days and earned $1,225.06. Of the 92 men on the seniority list in the calendar year 1961 only 27 were paid for over 200 days and 56, among whom was the petitioner, were paid for under 130 days. No one with a seniority date later than March of 1952 was paid for more than 130 days and the median seniority date of the men who were paid for more than 200 days was July of 1943 (E's App. 28-30). Relatively the same situation existed in the year 1960.

As to James Purdham

His seniority date as a shipfitter first class is May 10, 1955 (E's App. 1). He had worked for the Company prior to that time, but did not return when recalled since he had another job at the time and did not think his job at Maryland Shipbuilding would be stable in view of the many and repeated layoffs (E's App. 2).

During the twelve month period prior to the accident, as well as during the calendar year 1961, he had not worked elsewhere (E's App. 3). His work was subject to frequent layoffs and in the year preceding his injury he was laid off and recalled seven times, ranging in duration from one day to nearly three months (E's App. 2, 3). When recalled to work from layoff he was never told how long the job would last, and admitted that he was working on a day to day basis (E's App. 3).

There were many times when no shipfitters were working, other than those with the oldest seniority, and there were numerous layoffs in all departments (E's App. 4, 5). In the calendar year 1961 Purdham earned $3,011.58, was paid for a total of 125 days, including paid holidays and vacation days, and was sixteenth on the seniority list of a total of 40 shipfitters. In the 12 months prior to his accident the petitioner actually worked 136 days, was paid for a total of 149 days, earned $3,725.27 and was eighteenth out of a total of 41 shipfitters. The man immediately above him on the seniority list was Kleppert, who earned $3,873.41, and was paid for a total of 136 days. The man immediately below was Brady, who earned $3,476.76 and was paid for a total of 139 days (E's App. 14, 15).

It is interesting to note that the average annual wage of all the shipfitters on seniority for the year prior to the accident figures out to be $3,369.62. If this figure were used in computing the petitioner's compensation rate it would result in a weekly compensation rate of $43.20. The rate fixed by the Deputy Commissioner was $47.76 per week.

There was also testimony that in the calendar year 1960 Purdham earned $3,787.02.

Of the 41 men on the seniority list in the calendar year 1961 only 13 were paid for over 200 days and 26, among whom was the petitioner, were paid for less than 130 days. No one with a seniority date later than May of 1952 was paid for more than 130 days (E's App. 16-18). Relatively the same situation existed in the year 1960 and in that year no one with a seniority date later than July of 1951 was paid for more than 180 days.

Common to both

The following facts were developed in regard to the irregular and discontinuous nature of employment in the ship repair industry in the Baltimore area.

1. Layoffs in all crafts are a daily problem, varying drastically from day to day (E's App. 6, 12, 20, 22).

2. Shipyard work in this area has been at a very low ebb for several years (E's App. 7).

3. The "bread and butter of the business" is built around short term jobs and the ship repair industry, in this area, operates on a hand to mouth basis insofar as work is concerned (E's App. 7, 13).

4. When the hourly wage force is recalled, it is done on a day to day basis (E's App. 6, 7, 8, 9, 13, 22).

5. There is a considerable amount of mortality or drop-out of employees in the various crafts due primarily to the irregular nature of the employment (E's App. 8, 22).

6. Any one who has worked for the company for any length of time is fully aware of the irregular nature of the work (E's App. 12).

7. Except for a relatively small nucleus of workers, consisting of those with top seniority, there is really no

regular employment in the shipyard (E's App. 9, 10, 12, 21).

8. The ship repair industry is irregular in nature due to the fact that it is subject to the whims of customers, foreign competition, the weather and other factors (E's App. 5, 6, 8, 9, 19, 20, 21).

9. There are great variations of overall employment levels on a month to month basis, and further variations of employment levels between crafts and within a given craft, such as shipfitters and chippers and caulkers (E's App. 6, 19, 20).

There is nothing in the record to show, as contended by the petitioners (p. 6), that the seniority provision in the union contract is typical of that contained in most labor-management agreements.

ARGUMENT

I. There Is No Conflict Between Circuits.

The Decision of the Court of Appeals here is not in conflict with that of any other circuit, and there is no ground for certiorari on this basis. In fact the petitioners concede this point (Pet. pp. 9, 10) and do not attempt to cite or rely upon any conflict between the circuits. The issue presented in this case has been decided by four circuits and all have reached the same result:

Baltimore & O. R. Co. v. Clark, 59 F. 2d 595 (4 Cir. 1932); *O'Hearne v. Maryland Casualty Company*, 177 F. 2d 979 (4 Cir. 1949); *Continental Casualty Co. v. Lawson*, 64 F. 2d 802 (5 Cir. 1933); *Charles Nelson Co. v. Pillsbury*, 48 F. 2d 883, aff'd 56 F. 2d 80 (9 Cir. 1932); *Fireman's Fund Insurance Co. v. Van Steene*, 120 F. 2d 548 (9 Cir. 1941); *California Ship Service Co. v. Pillsbury*, 175 F. 2d 873

(9 Cir. 1949); *Mahony Co. v. Marshall*, 46 F. 2d 539 (W.D. Wash. 1931), aff'd 56 F. 2d 74 (9 Cir. 1932); *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411 (U.S. App. D.C. 1936); *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961).

It is perfectly obvious, as pointed out in the decision of the Court of Appeals (App. A, p. 3), that the law on this subject has been well settled since at least 1932 and that it would be extremely unfair and unreasonable to apply Subsection (b) in a case where the employment is shown to be of an irregular and discontinuous nature.

The petitioners have attempted to misstate the facts by suggesting, in the questions they raise in their petition (p. 3), that only their work was irregular and intermittent whereas the facts show that employment in the entire industry, in the Baltimore area, was of an irregular and discontinuous nature.

II. The Scope of Appellate Review in this Type of Case Is Extremely Narrow.

The petitioners have had not one, but three, days in Court. The Deputy Commissioner carefully considered all of the evidence and wrote a full memorandum explaining his decision (App. A, pp. 13a-19a). The District Court affirmed, also with an opinion (App. A, pp. 5a-8a). The Court of Appeals had no difficulty in unanimously affirming with a Per Curiam opinion (App. A, pp. 1a-4a).

The scope of appellate review, here as well as in the courts below, is extremely narrow. The scope of such review is governed by the Administrative Procedure Act 5 U.S.C.A. Sec. 1001 et seq., and has been considered by this Court in many cases involving different fields of law,

including specifically Workmen's Compensation cases arising under the Longshoremen's and Harbor Workers' Compensation Act. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951); *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *Radio Corporation of America v. United States*, 341 U.S. 412, 415 (1951); *F.T.C. v. Standard Oil Co.*, 355 U.S. 396, 401 (1958); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951).

These decisions point up that the findings of the administrative body, and the lower courts on review, are not to be disturbed if they are supported by any substantial evidence in the record. They also illustrate the rule, which is a wise one, that certiorari is not granted to review evidence. Indeed this rule is indispensable to the work of the Court. In *O'Leary v. Brown-Pacific-Maxon, Inc., supra,* Justice Frankfurter, in referring to the findings of the Deputy Commissioner, stated:

> "* * * The Standard, therefore, is that discussed in Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456. *It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.* * * *"
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> * * * * * *
>
> "* * * *We do not mean that the evidence compelled this inference;* we do not suggest that had the Deputy Commissioner decided against the claimant, a court would have been justified in disturbing his conclusion. * * *." (Emphasis supplied.)

A corollary of this proposition is that any logical inferences or deductions drawn from the evidence by the Deputy Commissioner must be taken as a fact and cannot be rejected by the court even if the evidence permits con-

flicting inferences. This Court in *Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469 (1947), said in this regard:

> "In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. *But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because of a belief that the one chosen by the Deputy Commissioner is factually questionable.*
>
> "* * * *It is likewise immaterial that the facts permit the drawing of diverse inference. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.*" (Emphasis supplied.)

III. This Case Does Not Involve a Question of National or Widespread Interest.

Undoubtedly the case is of importance to the petitioners but, contrary to their allegations, there is absolutely nothing in the record to indicate that it is of any public or widespread interest. The facts and the decisions are confined to the ship repair industry in the Baltimore area and more particularly to the wage earning capacity of these two individuals. The petitioners endeavor to persuade the court, despite the complete lack of any such evidence in the record, that this decision will effect the computation of benefits in every similar case throughout the country. It

is readily apparent, from the record and the decisions of both lower courts, that the case was decided on the basis of the particular facts. No hardship will result to any employees working in an industry wherein the employment is not irregular and discontinuous or in any area of the country where ship repair work is regular in nature. This is illustrated by the decision of the Court of Appeals for the Fourth Circuit in *O'Hearne v. Maryland Casualty Company, supra,* involving a shipfitter in the Norfolk area. No evidence was introduced to establish the irregular nature of the industry in that area and as a consequence the decision of the Deputy Commissioner, in using Subsection (b) of the Act to arrive at the claimant's average wage, was affirmed.

By the same token the decision, in the instant case, will not effect in any way those employees whose wage earning capacity, as established by the evidence, is sufficient to allow a different method of computing benefits. In other words those employees, whose wage earning potential is adequate, will not be affected in any way by their position on the so-called seniority list of any labor-management agreement. This strikes down the petitioners' argument (pp. 14-15) that the decision in this case would deprive any employee working under the seniority provisions of a labor-management agreement of the benefit of the formula set forth in Subsection (b) of the Act or of a favorable computation of benefits under Subsection (c). It is only in the situation, such as in this case, where the employment itself is irregular and discontinuous and the employee has a very limited wage earning capacity that the same result would obtain.

There is absolutely nothing in the record, or outside of it, to support the petitioners' allegations (p. 8) that prior

to 1961 claimants situated similarly to the petitioners were invariably allowed the maximum compensation benefits. To the contrary, each and every case in the Fourth Compensation District has always been decided on the basis of the particular facts involved and in many cases the claimants received less than the maximum rate.

The real allegation here is that each and every shipyard worker, or for that matter any other type of employee in any industry, should receive the maximum compensation rate of $70.00 per week when injured simply because his hourly wage rate, when working, would allow him to earn in excess of $105.00 per week on the basis of a 40 hour week. If this were true there would be no reason whatsoever for having Subsection (c) in the Act and the result would be obviously unfair to the employer and completely unreasonable. Congress certainly had this intention in mind when it enacted Subsection (c).

As pointed out by the District Court in its opinion (App. A, 5a, 6a):

> "* * *. Section 910 in its entirety is the Congressional effort to measure the lost earning power occasioned by death or accidental injury under the Act and to project its value in the event that benefits under the Act become payable by reason of accident or death.
>
> "The Congressional policy is fairly well fixed that the projection is to be made on earning power of the last 12 months, depending upon in which of the three categories spelled out in Section 910 a particular employee may fit."
>
> * * * * * *
>
> "* * * it would not be fair, to paraphrase the language of Subsection (c), to use the test of Subsection (b) of Section 910 because the result would be to create a projection of future economic earning capacity way

above any sense of reality or actuality, insofar as it was based upon the foreseeable future as he could see it but, more particularly, based upon a projection of what had taken place in the year immediately preceding the accident."

IV. The Decisions of the Deputy Commissioner and the Two Courts Below Were Correct and This Court Would Have To Affirm Even If Certiorari Were Granted.

(a) *The Record clearly supports the conclusion of the Deputy Commissioner and the Courts below that employment in the ship repair industry, in the Baltimore area, is irregular and discontinuous.*

The Deputy Commissioner in his memorandum sets forth the evidence which he considered in arriving at the conclusion that the employment itself is irregular, discontinuous and intermittent. The District Court and the Court of Appeals had no difficulty in determining that this conclusion was adequately and fairly supported by substantial evidence. In fact the petitioners do not even attempt to argue that the employment is of a regular and continuous nature. They simply contend that because the company did not cease operations entirely and did offer substantially full time employment to a few people, with top seniority, that this in itself required the Commissioner to compute their earnings by using Subsection (b) of the Act. This reasoning would make just about every type of employment regular in nature and certainly was not the Congressional intent. No authorities are cited to support the petitioners' position on this point, and there are none. In fact, all of the authorities are to the contrary.

(b) *Since the employment is irregular and discontinuous, the Deputy Commissioner was bound to use Subsection (c) of the Act in computing the petitioners' average weekly wage.*

The petitioners concede (pp. 9-10) that for 32 years the Courts of Appeals have consistently interpreted the statute in the manner represented by the decision below. However they argue that the rationale of these cases cannot stand the test of logic. Nothing could be more illogical than to hold otherwise. The Court of Appeals for the Fourth Circuit in *Baltimore & O. R. Co. v. Clark, supra,* used the following language in its opinion, at p. 599, to point up why it would be completely illogical to adopt the petitioners' argument on this point:

> "Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. *Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed.*" (Emphasis added.)

A careful analysis of the problem is also given by the Court of Appeals for the Ninth Circuit in *Mahony Co. v. Marshall, supra.*

The petitioners seize upon the word "class" as used in Subsection (b) of the Act and argue that the Deputy Commissioner was wrong in his interpretation of the term

(p. 9). They allege that simply because they are in the general classification, under the union agreement of shipfitters and chippers and caulkers, this in itself puts them in the same "class" as the men with top seniority. Proceeding from this point they conclude that as a consequence, regardless of the nature of the employment itself, Subsection (b) must be used. However this argument flies in the face of all the decisions of the Courts of Appeals.

(c) *Even if the employment were not irregular and discontinuous the Deputy Commissioner still must use Subsection (c) of the Act if it would be unfair and unreasonable to do otherwise.*

It is clear that even if the employment were not irregular and discontinuous this, in itself, does not automatically entitle the petitioners to have their wage computed under Subsection (b). In fact, to the contrary, the statute provides specifically that Subsection (b) should not be used where it would be unfair and unreasonable to do so. It does not state, nor do any cases hold, as the petitioners contend, that Subsection (c) should only be used in those cases where neither the injured employee nor any employees of the same or most similar class work substantially the entire year.

The most recent case involving Section 910 of the Act considered the precise point, *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961). It is interesting to note that this was the only appellate decision, involving Section 910 of the Act, wherein certiorari was applied for and it was denied. The case involved a laborer, employed on a 5 day basis who earned $2.35 per hour and $18.80 per day when he worked. In the year

preceding the accident he worked 180 days and the days he did not work were due either to weather conditions or the unavailability of work. The Deputy Commissioner found as a fact that the employment was of a continuous nature, but still used Subsection (c), rather than (a) or (b), and calculated the average wage by taking the total amount of wages earned by the claimant in the 12 months prior to the accident and dividing by 52. The District Court affirmed the Commissioner and the Court of Appeals upheld the decision on the basis that it was proper to use Subsection (c) where it would be inequitable to compensate the claimant on the basis of a theoretical wage earning capacity, even though the employment itself was of a continuous nature.

The petitioners argue (p. 10) that consideration should be given to the fact that they would have been employed for some time after the date of the accident if the injury had not occurred, although there is no such evidence in the record in the White case. However, the Act does not provide that subsequent earnings should be considered in determining an individual's average wage at the time of the accident and it is readily apparent that such a procedure would not be feasible. The purpose of the Act is to provide speedy benefits to those employees who are injured and it would certainly be impractical and unfair to wait months, after an accident occurs, to ascertain what an individual's earnings might have been before computing his wage.

If Subsection (b) were used in the instant cases, by multiplying the daily wage of $24.00 by 260, which would be the formula, you would arrive at an annual average earnings of $6,240.00 for each employee. This would be patently unfair, unrealistic and unreasonable, since White's

earnings for the calendar year 1961 were $1,315.49 and in the 12 months prior to his accident were $1,793.14. Purdham's earnings for the calendar year 1961 and 1960 were $3,011.58 and $3,787.02 respectively, and in the 12 months prior to the accident were $3,725.27. It is obvious from these figures alone that neither man could reasonably be expected to earn any where near the sum of $6,240 00.

The earnings of the petitioners were not unusual or peculiar but fitted into the general pattern, which was illustrated by the earnings of the men immediately above and below them on the seniority list. The evidence clearly demonstrated that neither of the petitioners had the capacity to earn a wage similar to those men with top seniority and that the employer did not have sufficient work to enable them to do so.

(d) *The method used by the Deputy Commissioner in the computation of the petitioners' average wage under Subsection (c) was proper and within the realm of administrative discretion vested in him.*

After correctly determining to use Subsection (c) the Commissioner used the petitioners' actual wage for the 12 months preceding their accidents and divided by 52 to compute their respective average weekly wage. The petitioners argue (pp. 11-12) that this method of computation was incorrect. Subsection (c) does not require the Commissioner to use the wages earned by the most similarly employed employees, but to have regard to such earnings as a guide in order to determine what the petitioners may have earned in the same employment. Neither Purdham nor White had the capacity in their employment to earn the wage of those higher on the seniority list because of

the seniority rule itself, which was that of their bargaining agent. Therefore, in looking for comparables about the only true comparable that exists with respect to these men, working in such a stratified occupation, is the experience with reference to the employees themselves. As a consequence it would seem that the Deputy Commissioner could have limited his considerations to simply the earnings of the petitioners and not consider any other evidence. However, despite the petitioners' allegation, there is no question about the fact that other evidence of other comparables were offered, received and considered by the Deputy Commissioner (T's App. 30-34).

The petitioners allege (p. 12) that the Deputy Commissioner expressly refused to consider the earnings of other employees in the Purdham case and that there was no reference to the earnings of other chippers and caulkers in the petitioner White's case, in the Commissioner's memorandum. It is obvious that the Commissioner did consider the earnings of the other employees in both cases, as pointed out by the Court of Appeals in its opinion (App. A, p. 3a), but after making the comparison reached the expert conclusion that the use of the petitioners' actual earnings for the previous 12 month period was fair and equitable to all concerned.

The fairness of this conclusion is illustrated by the fact that if you take the earnings of the men immediately above and below the petitioners on the seniority list, who would certainly be the most reasonable comparables, and average them out, the average weekly wage in White's case would be $30.01 rather than $34.48, as used by the Commissioner, and in Purdham's case it would amount to $70.09 rather than the calculated amount of $71.64. In addition, in the

case of petitioner Purdham if you use the earnings of all the men in the seniority unit and averaged them out you would come up with a compensation rate of $43.20 rather than the actual rate used by the Commissioner of $47.76. This demonstrates mathematically that the Deputy Commissioner actually came out with the fairest figure for the employees.

The other significant factor is that additional evidence, concerning the earnings of other men, was received to show that the averages, as a projection of past economic ability to earn money, are not out of line at all, and projecting the earnings of White and Purdham and using them as a basis for their awards does not create any inequity or disparity compared to what would be done if you took the averages of other comparable employees.

The Courts of Appeals, who have considered the question, clearly recognize that the Commissioner has some latitude in deciding exactly how the wage should be calculated under Subsection (c) and have recognized in many cases that there is nothing improper in using the employee's actual earnings in determining his average wage. See *Nelson Co. v. Pillsbury*, 56 F. 2d 80 (9 Cir. 1932); *Continental Casualty Co. v. Lawson*, 64 F. 2d 802 (5 Cir. 1933); *Fireman's Fund Insurance Co. v. Van Steene*, 120 F. 2d 548 (9 Cir. 1941); *Johnson v. Britton*, 290 F. 2d 355 (U.S. App. D.C.) cert. denied, 368 U.S. 859 (1961).

It is obvious, for the reasons set forth above, that on the merits the decisions of the Deputy Commissioner and the two courts below were correct. Therefore the granting of certiorari would be a waste of the Court's time, in the long run, since it would have to affirm on the facts.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 882

JOSEPH B. WHITE AND JAMES PURDHAM, PETITIONERS

v.

STEPHEN O'HEARNE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, FOURTH COMPENSATION DISTRICT, AND MARYLAND SHIPBUILDING AND DRYDOCK CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE DEPUTY COMMISSIONER IN OPPOSITION

OPINIONS BELOW

The oral opinion of the district court (Pet. App. 5a–8a) is not reported. The opinion of the court of appeals (Pet. App. 1a–4a) is reported at 338 F. 2d 464.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1964. The petition for a writ of certiorari was filed on February 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Deputy Commissioner correctly computed petitioners' "average annual earnings" for purposes of determining the amount of compensation benefits to which they were entitled under the Longshoremen's and Harbor Workers' Compensation Act.

STATUTE INVOLVED

Section 10 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1431, as amended, 62 Stat. 603, 33 U.S.C. 910, provides in relevant part as follows:

> Except as otherwise provided in this Act the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings, if a six-day worker, shall consist of three hundred times the average daily wage or salary, and, if a five-day worker, two hun-

dred and sixty times the average daily wage or salary, which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

* * * * *

STATEMENT

Petitioners, who were awarded compensation for employment-connected injuries under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, brought this action to review the Deputy Commissioner's computation of the amount of benefits to which they are entitled. Both petitioners

were employed by the respondent company in the ship repair business (Resp. App. 5).[1] Petitioner White was a chipper and caulker (App. 34, Resp. App. 23); petitioner Purdham was a shipfitter (App. 30). The company's practice is to employ men only as needed on a daily basis. Since the bulk of the company's business is in short-term repair jobs and the number of such jobs which it has at any one time fluctuates widely, the company is able to provide regular employment for a relatively small nucleus of men at the top of the seniority list (Resp. App. 5–10, 12, 18–22, 32, 33). Neither White nor Purdham was near the top of the seniority list for his job classification, and neither man worked regularly for the company in the year preceding his injuries. White worked 63 days in that year and was paid for 74 days; Purdham worked 136 days and was paid for 149 days (the difference in each case being attributable to days of paid vacation) (App. 30, 34). Neither man found other work during that year (Resp. App. 3, 23).

Compensation was awarded to each man for both temporary total disability and permanent partial disability. White, who broke a bone in his left foot, was out of work for nine weeks and two days (Pet. App. 9a, 10a); Purdham, who broke a bone in his left hand, was out of work for eight weeks and two days (Pet. App. 11a, 12a). In addition to receiving compensation for temporary total disability, White was rated

[1] "Resp. App." refers to the Appendix for Appellees in the Court of Appeals. "App." refers to the Appendix for Appellants in the Court of Appeals. "Pet. App." refers to the Appendix to the petition for a writ of certiorari.

with a 17.5 percent permanent disability of his left foot, and Purdham with a 10 percent permanent disability of his left hand (Pet. App. 10a, 12a). Compensation for both temporary total disability and permanent partial disability was computed by the Deputy Commissioner on the basis of the earnings of each petitioner for the year preceding his injury (Pet. App. 9a, 11a, 18a–19a).

The Deputy Commissioner computed petitioners' compensation under Section 10(c) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 910(c), which provides that average annual earnings shall be such sum as shall "reasonably represent the annual earning capacity of the injured employee." That subsection prescribes three factors in accordance with which that figure is to be determined: (1) previous earnings of the injured employee in the employment in which he was engaged when injured, (2) previous earnings of other employees "of the same or most similar class working in the same or most similar employment in the same or neighboring locality," or (3) other employment including self-employment of the injured employee. The Deputy Commissioner used the first of these factors as the basis for his computation and determined "average annual earnings" by looking to each petitioner's actual earnings for the preceding year (Pet. App. 18a).

The district court and the court of appeals sustained the Deputy Commissioner. Relying on two prior decisions in the same circuit,[2] the court of ap-

[2] *Baltimore & O. R.R. Co.* v. *Clark*, 59 F. 2d 595 (C.A. 4); *O'Hearne* v. *Maryland Casualty Co.*, 177 F. 2d 979 (C.A. 4).

peals held that the Deputy Commissioner properly computed "average annual earnings" under Section 10(c) rather than under Section 10(b) because subsection (b) could not "reasonably and fairly" be applied to measure petitioners' average annual earnings since their "employment during the appropriate statutory period was intermittent and irregular in nature" (Pet. App. 3a). The court of appeals also held that it would not disturb the Deputy Commissioner's "expert conclusion that the use of the litigants' actual earnings for the previous twelve-month period was fair and equitable to all concerned, because the seniority system controlled the availability of work for the individual employee, resulting in substantial differentials in earnings" (Pet. App. 3a).

ARGUMENT

The Deputy Commissioner and the courts below correctly applied the Act, and no conflict of decisions has been shown. There is no occasion for further review by this Court.

1. Compensation for disability under the Act is computed on the basis of the employee's "average weekly wages." 33 U.S.C. 908.[3] Average weekly

[3] The injured employee is paid 66⅔% of his average weekly wages for the period of total disability. 33 U.S.C. 908 (a), (b). For permanent partial disability, where the injury is of a type specified in the statutory schedule (as were petitioners' injuries), he receives 66⅔% of his average weekly wages for a specified number of weeks, the number varying according to the part of the body affected and the percentage of disability of that part. 33 U.S.C. 908(c). This award is paid regardless of whether the partial disability actually affects wage-earning capacity. Compare 33 U.S.C. 908(c)(21).

wages are computed under Section 10 of the Act, which provides that they shall be 1/52 of the employee's "average annual earnings." 33 U.S.C. 910 (d). Section 10 provides three alternative methods of computing "average annual earnings." Petitioners' initial contention is that the Deputy Commissioner applied the wrong method of computing average annual earnings.

Subsection (a) of Section 10 applies only where the injured employee shall have worked in his present or a similar employment during "substantially the whole of the year immediately preceding his injury." Petitioners concede that subsection (a) is not applicable.

Subsection (b) provides for cases in which the injured employee shall not have worked in his present or similar employment during substantially the whole of the year preceding the injury. The method provided is to multiply by 260 (if the injured employee is a five-day worker) the average daily wage of an employee "of the same class" who did work for substantially the whole of the preceding year. However, subsection (b), as well as subsection (a), may be displaced by the method set forth in subsection (c) "[i]f either of the * * * methods [provided in the first two subsections] of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied * * *." 33 U.S.C. 910(c). The Deputy Commissioner held, under this language, that the sporadic nature of petitioners' employment during the year preceding their injuries rendered application of subsection (b) unreasonable and unfair (Pet. App. 14a–17a).

Since the statute prescribes that compensation is to be awarded on the basis of "average annual earnings" and not on the basis of expected earnings for the period of disability, the Deputy Commissioner's conclusion was entirely correct even if it were true that petitioners would have had work available during the entire period of their temporary disability. Petitioner White earned $1,793.14 for 74 days of work in the preceding year and petitioner Purdham earned $3,725.27 for 149 days of work during that period (Resp. App. 27, 14). Obviously neither petitioner could be considered as having "average annual earnings" of $6,240—the figure which would result from petitioners' suggested computation under Section 10(b).[4]

Nor is there any merit to petitioner Purdham's claim that the Deputy Commissioner was obliged to consider the likelihood that he would, in the future, move up the seniority scale and thereby obtain more regular employment. Section 10 provides for a calculation of average annual earnings "at the time of the injury" and does not authorize the Deputy Commissioner to allocate weight to future possibilities or probabilities.

As petitioners concede, the holding below—that subsection (b) cannot fairly and reasonably be applied to

[4] Nor are petitioners' claims particularly equitable. The larger portion of the compensation award was not for their temporary total disability but for their permanent partial disability. The latter should, of course, turn not on the work available to petitioners during the several weeks when they were totally disabled (when, they claim, they "would have continued to work" (Pet. 10)), but on available evidence regarding their earnings over a long-term period.

measure average annual earnings where employment is sporadic—is in accord with decisions of three other courts of appeals which have considered the problem. See *Marshall* v. *Andrew F. Mahony Co.*, 56 F. 2d 74 (C.A. 9); *California Ship Service Co.* v. *Pillsbury*, 175 F. 2d 873 (C.A. 9); *Johnson* v. *Britton*, 290 F. 2d 355 (C.A.D.C.), certiorari denied, 368 U.S. 859; *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C.A. 5).[5]

2. Petitioners also contend that even if the Deputy Commissioner's choice of subsection (c) was proper, his application of that subsection was improper. Subsection (c), where applicable, provides that average annual earnings shall be such sum as shall "reasonably represent the annual earning capacity of the injured employee," having regard to the previous earnings of the injured employee and of "other employees of the same or most similar class." The Deputy Commissioner considered previous earnings of other work-

[5] The holding of the court below and the decisions cited in the text leave room for application of subsection (b) in at least two situations. First, subsection (b) may be applied where the employment is regular but the injured employee was hired less than a year before the injury and so did not work regularly throughout the year preceding the injury. This was the situation in *O'Hearne* v. *Maryland Casualty Co.*, 177 F. 2d 979 (C.A. 4), in which the court held that subsection (b) must be applied. Second, subsection (b) might be applied if the irregularity of the employee's work in the year preceding the injury resulted from an abnormal situation and did not accurately reflect the injured employee's wage earning capacity. There is no showing here that the irregular employment of White and Purdham in the year preceding their injuries was abnormal. Indeed, irregularity of employment for all but the top men on the seniority list was shown to be a chronic condition in the local ship repair yards (Resp. App. 5–9, 18–22).

ers but concluded that previous earnings of men with a different seniority status could not be used to determine petitioners' annual earning capacity, in view of the effect of seniority on earning capacity in this industry (Pet. App. 17a–18a).

Petitioners contend that Congress, by using the word "class" in providing for comparison with the earnings of "other employees of the same or most similar class," intended to refer to the job classifications set forth in the collective bargaining agreement governing petitioners' jobs (Pet. 13–15). Even on this assumption, however, it would surely be necessary for the Deputy Commissioner to consider earnings of other employees only insofar as they occupy the same seniority status as the injured employee. It was as a result of their seniority status and not of their hourly wage that petitioners' "average annual earnings" were below those of other employees in the same job classifications.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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